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In The

Supreme Court of the United

October Term, 1988

(2)

No. 88 - 1010

LANDAHL, BROWN & WEED ASSOCIATES, INC.,
Petitioner,

v.

LONGARDNER & ASSOCIATES, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Bankruptcy Court erred in denying a creditor's motion to set aside a confirmed Plan of Reorganization after the creditor had been given actual notice of the confirmation hearing and failed to attend or inquire what the court had ordered at the hearing, and then without alleging fraud moved to set the confirmation aside more than two months after its entry, on the grounds that it did not know of the confirmation order?

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STATEMENT OF THE CASE

In this case a creditor who was given actual notice of a confirmation hearing sought to challenge the plan of reorganization more than two months after the hearing and after the Bankruptcy Court entered its order confirming the plan, on the grounds that it did not receive notice of the entry of the order. The courts below held the creditor failed to timely appeal the plan and failed to allege or show that the order was procured by fraud and the Bankruptcy Court did not abuse its discretion in denying the creditor relief. The creditor has now petitioned this Court for a writ of certiorari on the grounds that it did not receive notice of the entry of the confirmation order. This Court should deny the creditor's petition because the lower courts correctly applied this Court's decisions and the Bankruptcy Code, and the Bankruptcy Court acted within its power and discretion in light of the evidence in denying the creditor relief, and there is no conflict among the Courts of Appeals or an important question of law that merits this Court's attention.

STATEMENT OF FACTS

This case began on October 22, 1982, when the Respondent, Longardner Associates, Inc. ("Longardner"),[1] filed a Petition for Reorganization pursuant to Chapter 11 of the Bankruptcy Code. The Petitioner, Landahl, Brown & Weed Associates, Inc. ("Landahl"), was a judgment creditor of Longardner and filed a proof of claim in the Bankruptcy Court.

The facts relevant to this petition began on November 26, 1984, when the Bankruptcy Court decided in the presence of Longardner's and Landahl's respective counsel to reschedule the confirmation hearing on Longardner's Amended Plan of Reorganization. On December 12, 1984, the court scheduled the confirmation hearing for March 7, 1985, and certified that notice of the new hearing date had been mailed to the parties. This notice was sent to Landahl at the address of its attorney, Edward DeV. Bunn. Mr. Bunn later denied receiving this notice, but agreed that the court records listed his correct address. The court also scheduled for March 7, 1985, a hearing on Longardner's objection to Landahl's claim. This second hearing was later taken off the docket because the parties settled the dispute between them.

Thereafter, on March 7, 1985, the Bankruptcy Court held a hearing on confirmation of Longardner's Amended Plan of Reorganization. After hearing testimony from Ted E. Andrews, C.P.A., regarding the feasibility of the Plan, the court entered an order confirming the Amended Plan of Reorganization, stating in part:

> 2. That the proponent of the Amended Plan complies with the applicable provisions of the Code;
>
> 3. That the Amended Plan has been proposed in good faith and not by any means forbidden by law.

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[1] Longardner Associates, Inc. has no parent company, subsidiaries or affiliates.

On May 21, 1985, more than two months after the court had entered its order confirming the Plan, Landahl filed a motion to set aside the order and a motion to reconsider. As the basis for its motions, Landahl asserted that it had never received notice of the rescheduled confirmation hearing on March 7, 1985, that it had never received notice of the entry of the court's order approving the Plan, and that it had been prejudiced by its failure to receive these notices.

The Bankruptcy Court held a hearing to consider Landahl's motions on August 30, 1985. At that hearing, Landahl's attorney alleged that he had not received notice of the confirmation hearing. However, he confirmed that the mailing address in the court's records was his correct address, and at no time suggested that either the court or counsel for Longardner had misled him with respect to the hearing on March 7, 1985. The court's records indicated that notice of the hearing had been sent first class mail to his address and was not returned to the clerk's office. The court then advised Landahl's attorney that under the Bankruptcy Code, fraud was the sole basis to set aside a confirmed plan of reorganization. Landahl's attorney disavowed any fraud.

At the conclusion of the August 30 hearing, the Bankruptcy Court found that Landahl, through its attorney, Mr. Bunn, was given notice of the reassigned confirmation hearing, that Landahl had not shown or even alleged that confirmation of the Amended Plan of Reorganization was procured by fraud, and that Landahl had not submitted persuasive evidence showing that the debtor's representatives ever misled Landahl or its attorney.

In its petition for writ of certiorari to this Court, as in the courts below, Landahl again contends that it was never given notice of the rescheduled confirmation hearing. However, the Bankruptcy Court found that notice was sent first class mail to the address of Landahl's attorney and

was not returned, and therefore Landahl was given notice of the rescheduled hearing. The District Court for the Southern District of Indiana and the Seventh Circuit Court of Appeals held that this finding was not clearly erroneous.

In its petition, Landahl also suggests that it was discriminatorily treated in the Amended Plan of Reorganization. The Plan provided for all Class 7 unsecured creditors to receive their pro rata share of $10,000.00 in the aggregate. Landahl, in a separate class, was to be paid $5,000.00. The Bankruptcy Court approved the Plan, and it is not now an issue before this Court.

STATEMENT OF PROCEEDINGS BELOW

On December 9, 1985, the Bankruptcy Court confirmed the Amended Plan of Reorganization and denied Landahl's motion to set it aside. Landahl then appealed to the United States District Court for the Southern District of Indiana. That court held that the Bankruptcy Court did not err in finding that notice of the new date for the confirmation hearing was delivered to Landahl's attorney, and that the Bankruptcy Court properly refused to set aside the confirmation order because Landahl had not shown fraud.

The District Court also concluded that the clerk's failure to send Landahl notice of the March 7, 1985 order confirming the Plan did not affect Landahl's time to appeal the order. It concluded that Landahl did not exercise due diligence to ascertain whether the order had been entered, or give sufficient reason for lack of such diligence. Although B.R. 9022(a) requires the clerk of the court to mail notice of any order entered by the bankruptcy judge, it also provides that lack of notice of the entry does not affect the time to appeal. After the time to appeal the order had run, the confirmed plan could only be revoked under 11 U.S.C. § 1144 on a showing of fraud. However, the record from the Bankruptcy Court hearing was devoid of any evidence on the issue of fraud. Therefore, the Bankruptcy

Court properly concluded that there was no basis to set aside the Plan.

The Seventh Circuit Court of Appeals affirmed in *In Re Longardner & Associates, Inc., 855 F. 2d 455 (7th Cir. 1988)* (hereinafter the "Appellate Decision"). It held that the Bankruptcy Court's Findings of Fact were not clearly erroneous. The court concluded that Landahl had failed to rebut the presumption that notice of the March 7, 1985 confirmation hearing was delivered to its attorney, and the notice of the confirmation hearing mailed to all parties was "reasonably calculated to reach interested parties," citing *Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 318 (1950).* This notice of the pendency of the hearing was sufficient to satisfy due process requirements, even if Landahl did not receive notice of the entry of the order, because Landahl had the opportunity to be heard at the March 7 hearing. The court also concluded that because Landahl failed to show specific acts involving fraudulent intent, it was not entitled to have a confirmed plan of reorganization revoked under § 1144.

The court agreed with Landahl that the Bankruptcy Court is a court of equity which might have fashioned relief for the creditor. However, the Bankruptcy Court in this case did not abuse its discretion in not providing equitable relief to Landahl.

> [W]here the bankruptcy court chose to confine itself to Section 1144 to provide relief to the creditor, and where it made this choice very clear by repeatedly instructing the creditor to demonstrate fraud, we will not reverse the court for not providing equitable relief.

Appellate Decision, 855 F. 2d at 462.

Landahl has now petitioned this Court for a writ of certiorari on the grounds that it did not receive notice of the entry of the confirmation order, and thus the Bankruptcy Court should have extended the time for appealing

order or should have expanded § 1144 of the Bankruptcy Code to allow it to revoke a confirmed plan of reorganization where there was no fraud.

REASONS FOR DENYING THE WRIT

The Bankruptcy Court's Decision Denying Landahl's Motion to Set Aside the Confirmation Order Was Within the Law and Its Discretion and Presents No Important Legal Issue for This Court's Review.

The Bankruptcy Rules gave Landahl ten days from the date of the Bankruptcy Court's order approving the Longardner Plan of Reorganization to appeal the order, unless it moved for an extension within that time. B.R. 8002. Landahl did not move for an extension and filed its motion to set aside the order seventy-five days after it was entered. 11 U.S.C. § 1144 provides that a confirmed plan of reorganization may only be set aside on a showing that the order was procured by fraud. A bankruptcy court may have the discretion to provide additional extensions of time in light of particular circumstances, but its failure to do so does not create an important issue of law to be decided by this Court. The Bankruptcy Court in this case declined to find any reason for setting aside the order, given that Landahl did not allege or show that the confirmation order had been procured by fraud and given that Landahl had an opportunity to challenge the order at the March 7 hearing. The District Court and the Court of Appeals held the Bankruptcy Court did not abuse its discretion and its findings were not clearly erroneous.

Landahl now petitions this Court for a writ of certiorari and argues that because it did not receive notice of the entry of the order, the Bankruptcy Court should have exercised its equitable jurisdiction and allowed it additional time to appeal or allowed it to set aside the order on grounds other than fraud. This Court should deny Landahl's petition because the Bankruptcy Court properly

denied it relief in light of the evidence, and there is no conflict in the Circuits and no important question of federal law meriting this Court's review.

A. Landahl had the notice due process requires of the confirmation hearing on March 7, 1985, at which the Bankruptcy Court issued its order approving the Plan of Reorganization.

The Bankruptcy Court found in light of all the evidence[2] that notice of the confirmation hearing was mailed to Landahl at its attorney's address. Landahl thus received precisely the kind of notice of the hearing this Court has held due process requires. *See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)* (holding state action which adversely affects property interests must be accompanied by such notice as is reasonable under the particular circumstances); *Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (1983)* (requiring actual notice to an affected party whose name and address are "reasonably ascertainable"); *New York v. New York, New Haven and Hartford R.R. Co., 344 U.S. 293 (1953)* (requiring actual notice to known creditors in bankruptcy proceedings). Last term, this Court reaffirmed that due process requires that a known or "reasonably ascertainable" creditor be given notice by mail or such other means as is certain to insure actual notice. *Tulsa Professional Collection Services, Inc. v. Pope,___U.S. ___, 108 S. Ct. 1340 (1988).*

On December 12, 1984, the Bankruptcy Court entered its certificate of mailing signed by the deputy clerk, verifying that notice of a reassigned confirmation hearing for

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[2] Although Landahl's attorney testified that he did not receive the notice, he verified that the address to which the notice was mailed was his correct mailing address. The Bankruptcy Court's records showed that the notice was not returned to the clerk's office, as it should have been if it could not be delivered as addressed. (Bankruptcy Court's Finding No. 6.)

March 7, 1985, was sent by first class mail to all creditors and parties in interest, including Landahl, whose notice was sent to the address of its attorney, Edward DeV. Bunn. (Bankruptcy Court's Finding of Fact No. 5.) Landahl, through its attorney, thus received actual notice of the reassigned confirmation hearing. Due process did not require that Landahl receive notice of the order resulting from that hearing after Landahl failed to attend.

The Seventh Circuit held that notice of the pendency of a hearing to consider confirmation of the Plan was sufficient to satisfy due process requirements because the creditor had an opportunity to be heard at the March 7 hearing. Appellate Decision, 855 F. 2d at 465. Landahl could have attended the hearing, presented its objections to the Plan, and received a copy of the judge's ruling. Landahl also could have telephoned the judge's clerk after March 7, 1985, to inquire as to whether the judge had ruled and an order had been entered. Instead, Landahl did not learn of the entry of the order until May 15, 1985.

There is no novel issue here. Due process requires notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co., supra, at 314.* In this case, Landahl received such notice before it was deprived of its right to appeal an order confirming a plan of reorganization.

B. Under the Bankruptcy Code and Rules, Landahl lost its chance to appeal or challenge the Bankruptcy Court's order confirming the Longardner Plan of Reorganization, and the Bankruptcy Court did not find compelling reasons to grant Landahl relief from the Rules.

Under B.R. 9022, like Fed. R. Civ. P. 77(d), lack of notice of the entry of a bankruptcy judge's order does not affect the time to appeal. Nor does it relieve or authorize

the court to relieve a party for failure to appeal within the time allowed, except as otherwise permitted by the Rules. B.R. 9022. Landahl contends it never received notice of the judge's order of March 7, 1985, and thus failed to appeal it according to the time limits in B.R. 8002. The courts below applied the plain language of B.R. 9022 and found Landahl lost its chance to appeal. Landahl now seeks before this Court to avoid the results of B.R. 9022.

Landahl also seeks to avoid the plain language of 11 U.S.C. § 1144, providing that a bankruptcy court may revoke an order of confirmation within one hundred eighty days of its entry, if and only if the order was procured by fraud. Landahl moved to set aside the confirmation order but disavowed any fraud.[3]

Landahl does not argue that § 1144 and B.R. 9022 are unconstitutional. Landahl simply argues that the bankruptcy judge should not have applied the Bankruptcy Code and Rules in this case. Its arguments did not convince the lower courts, and they do not create an important question of law for this Court's review.

In its petition, Landahl cites cases in which courts allowed relief from a judgment under Fed. R. Civ. P. 60(b) in order to ameliorate an apparently harsh result under Rule 77(d). In spite of its arguments, these cases do not

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[3] Mr. Bunn, Landahl's attorney, testified at the August 30, 1985, hearing before the bankruptcy judge:

> Mr. Bunn: I don't believe there was any fraud. I am not even suggesting there was fraud.
>
> The Court: But that's the only section you can set it aside under the Bankruptcy Act, and so I might as well just tell you right now that that is the burden.
>
> Mr. Bunn: I don't believe I was defrauded in any way. I don't think that happened-
>
> The Court: But that's the burden you have to carry.
>
> Mr. Bunn: I don't know what happened or why it happened, but I don't think it was fraud.

create a conflict in the Circuits. In some circumstances, courts have allowed relief under Rule 60, but the Seventh Circuit did not in this case, applying *Spika v. Village of Lombard, 763 F. 2d 282 (7th Cir. 1985), cert. denied, 474 U.S. 1056 (1986).* There the Seventh Circuit held that Fed. R. Civ. P. 60(b) cannot be invoked to provide relief from Rule 77(d) when "the *sole* reason asserted for that relief is the failure of a litigant to receive notice of entry of a judgment." *Spika* at 286.

In this regard, *Spika v. Village of Lombard* is consistent with cases in other Circuits. Those courts which have allowed the use of Rule 60(b) motions to circumvent the results of Rule 77(d) have usually held that "the simple failure of the clerk to mail notice of the entry of judgment, without more, does not permit relief to a party who has failed to appeal within the prescribed time." *Hall v. Community Mental Health Center, 772 F. 2d 42 (3rd Cir. 1985), citing Wilson v. Atwood Group, 725 F. 2d 255, 257 (5th Cir. 1984), (en banc), cert. dismissed, 468 U.S. 1222 (1984).* Even if this Court ever wanted to settle under what circumstances Rule 60(b) can offer relief to a party who has lost his right to appeal under Rule 77(d), this case is not the one to do it. This case presents none of the extraordinary circumstances other courts have found in justifying relief from the effects of Rule 77(d).[4]

Moreover, Landahl cites no case where a bankruptcy judge applied Fed. R. Civ. P. 60(b) and allowed a party to revoke a confirmed order of confirmation without alleging fraud. B.R. 9024 provides that Rule 60 cannot relieve a party from the requirements of 11 U.S.C. § 1144, which provides that a confirmed plan of reorganization can only

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[4] Landahl argues on page 31 of its petition that this is "not just a simple case when no notice was sent to counsel . . ." However, the courts below found there was not persuasive evidence of any attempt by Longardner to mislead Landahl or its attorney, and no evidence that Longardner ever intended to defraud the court.

be revoked under § 1144 within one hundred eighty days of the entry of the order and on a showing of fraud.

> Rule 60, F. R. Civ. P., applies in cases under the Code except that . . . (3) a complaint to revoke an order confirming a plan may be filed only within the time allowed by § 1144 . . .

B.R. 9024.

Landahl argues that B.R. 9024 also should not apply to this case because its motion to set aside the confirmation order is not a "complaint." However, regardless of labels, Landahl seeks to revoke the confirmation order of a Chapter 11 plan, and such an attempt is an adversary proceeding. *See*, B.R. 7001(5). Such a proceeding begins with a complaint. B.R. 7003. The fact that Bankruptcy Judge Sufana allowed Landahl to file a "Motion to Set Aside Order Confirming Amended Plan and Motion to Reconsider" instead of requiring it to file a complaint, does not change the nature of the motion, which is one to commence an adversary proceeding to revoke an order of confirmation. Landahl's motion must thus comply with § 1144, and Rule 60, Fed. R. Civ. P., does not allow Landahl relief.

Landahl also argues that the Bankruptcy Court should have exercised its equitable jurisdiction in this case and allowed it to revoke a confirmation order under § 1144 without showing fraud. However, this Court has stated, "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank Worthington v. Ahlers, 485 U.S. ___, 99 L.Ed.2d 169, 179 (1988).* Landahl cites cases where bankruptcy courts did exercise their equitable powers, but in none of them did a court let a party revoke a confirmed plan of reorganization after rights had accrued under it without even alleging fraud. Furthermore, even if bankruptcy courts ever do have the equitable power to expand § 1144 to include grounds other than fraud for revoking a confirmation order, was the Bankruptcy

Court's strict application of § 1144 in this case an abuse of discretion? This question is hardly of national significance, as Landahl suggests. As the Seventh Circuit stated:

> We do not believe . . . the bankruptcy court abused its discretion in not providing equitable relief to this creditor. As we have noted, "although a reorganization court is indeed a court of equity, . . . it is yet constrained by the dictates of the Bankruptcy Act." . . . Thus, where the bankruptcy court chose to confine itself to Section 1144 to provide relief to the creditor, and where it made this choice very clear by repeatedly instructing the creditor to demonstrate fraud, we will not reverse the court for not providing equitable relief.

Appellate Decision, 855 F. 2d at 462 (citations omitted).

CONCLUSION

This Court should deny Landahl's Petition for Writ of Certiorari because it fails to present an important issue of law or a conflict in the Circuits which merits this Court's review. The Bankruptcy Court's decision in this case, affirmed in the courts below, was well within the law and its discretion.

Respectfully submitted,

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